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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 142

ENDICOTT JOHNSON CORPORATION, a corporation, and HOWARD A. SWARTWOOD, Secretary, Endicott Johnson Corporation,

Petitioners,

against

FRANCES PERKINS, Secretary of Labor of the United States,

Respondent.

BRIEF FOR PETITIONERS

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October, 1942.

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BRIEF FOR PETITIONERS

The case is here on certiorari to review a decision and decree of the United States Circuit Court of Appeals for the Second Circuit entered May 22, 1942, reversing orders of the District Court for the Northern District of New York entered February 19, 1941 and October 27, 1941, respectively (R. 63, 283).

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 298-332) is reported at 128 F. (2d)

208. Opinions of the District Court (R. 55 and 278) are reported in 37 Fed. Supp. 604 and 40 Fed. Supp. 254.

JURISDICTION

Jurisdiction of this Court is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. A writ of certiorari was granted herein on October 12, 1942.

STATUTE INVOLVED

The proceedings were instituted pursuant to the so-called Walsh-Healey Public Contracts Act (49 Stat. 2036, and hereinafter generally referred to as the Act), a full copy of which is printed as an appendix to this brief.

QUESTIONS PRESENTED

I. *Power:*—When an action is brought in a district court to enforce subpoenas *duces tecum* issued by an administrative agency, calling for documents entirely unrelated to the coverage of the Act, does the district court have power to inquire into the coverage of the Act, when that is put in issue, or must it enforce the subpoenas merely on the allegation by the administrative agency that the Act applies?

II. *Coverage:*—The petitioner, Endicott Johnson Corporation, entered into contracts with the United States for the manufacture, in stated factories, of shoes; it also maintains separate and distinct factories and plants for the tanning of leather, the manufacture of rubber heels, rubber soles, cut soles, counters and cartons. Are these latter factories and plants subject to the Act which relates solely to petitioner's contracts to manufacture shoes in the specified shoe factories?

STATEMENT

Endicott Johnson Corporation, the corporate petitioner, is a manufacturer of footwear; a manufacturer of leather; a manufacturer of rubber heels and soles; a manufacturer of cut leather soles, including outer soles, middle soles and inner soles; a manufacturer of counters and a manufacturer of cartons. Its plants are located at Binghamton, Johnson City, Endicott and Owego, New York (R. 14). They consist of numerous and separate shoe factories, numerous and separate tanneries and rubber mills and separate and distinct plants for the manufacture of cut soles, counters and cartons (R. 14).

Endicott Johnson Corporation's shoe factories are located in all four towns and it manufactures and sells shoes primarily for civilian use. Its tanneries are all located at Endicott; most of the leather manufactured in these tanneries is used by it in the manufacture of shoes but some of it is used for other purposes and some is sold. Its rubber mills for the manufacture of rubber heels and soles are all located at Johnson City; most of these rubber heels and soles are used by it in the manufacture of shoes but some of them are sold. These rubber mills also manufacture golf balls and rubber for footwear. Its sole cutting plants are located at Johnson City and Endicott. It has counter plants at Johnson City and it has carton plants at both Johnson City and Endicott (R. 14).

Between 1936 and 1938 Endicott Johnson Corporation entered into fifteen contracts with the United States. By stipulation (R. 294) the portion of one contract only is printed as a part of the Record. This contract, typical of all the contracts, provides that it is:

"For 133,524 pairs Shoes, Service; Special Type 'B' with Full Middle sole and Rubber Heel; 182,256 pairs Shoes, Service, Special Type 'B,' with Corded Rubber Sole and Uncorded Rubber Heel.

"To be manufactured at or supplied from Geo. F. Tabernacle, Binghamton, N. Y." (Ex. 2b, R. 178).

The other fourteen contracts were also for the sale of shoes and each of the fifteen contracts was for over $10,000 and contained the stipulation or representation* concerning wages, hours of labor and working conditions called for by the Act (R. 172, 173). The Corporation was required to name, in each contract, the factory where the shoes covered thereby were to be manufactured. The shoe factories, where the shoes called for by these contracts were manufactured, are located in Binghamton and Johnson City. The Government Contracting Officer maintained inspectors in each of these factories and plants for the inspection of materials and finished shoes. However, in the factories and plants manufacturing leather, rubber heels, rubber soles, cut soles, counters and cartons, no inspectors were maintained and those factories and plants were not named in any contract (R. 177). Further, the articles produced in the petitioner's tanneries, rubber mills and sole cutting, counter and carton plants were not articles of the general character called for in the shoe contracts (R. 16, 17, 18).

After these contracts had all been performed the Department of Labor commenced a proceeding against Endicott Johnson Corporation, claiming that in performing its contracts with the United States it had not complied with

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*The entire stipulation or representation appears in Section 1 of the Act, pages 49 and 50, *infra*.

the Act in the factories and plants manufacturing leather, rubber heels, rubber soles, cut soles, counters and cartons. It was claimed that the Act applied to those factories and plants, as well as to the factories manufacturing shoes, even though the acting administrator of the Act had ruled, previously, in a similar situation, that the manufacture of articles to be used in the finished product was not part of the manufacture of the finished product (R. 50, 51, 52).

On December 7, 1939 the Department served in the proceeding the subpoenas *duces tecum* involved herein. These subpoenas called for the production of "all time cards, time books, employees' wage statements and payroll records, showing the hours worked each day and each week by, and the wages paid each pay period to, persons employed by the Endicott Johnson Corporation", in certain factories and plants during various periods betwen October 26, 1936 and October 11, 1938. The petitioners willingly furnished the information as to the shoe factories, but refused to produce the record as to the factories and plants manufacturing leather, etc. on the ground that those factories and plants are not covered by the Act.

On January 15, 1940 an action to enforce the subpoenas, under Section 5 of the Act, was commenced in the District Court for the Northern District of New York. The complaint or application, by which this proceeding was begun, alleged that the Secretary "has reason to believe" that the Act covers the operations of the petitioner in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons (R. 5, Par. 9). In its answer the petitioner denied that the Act covered the factories and plants in question (R. 13, Par. Ninth). On June 26, 1940 the Secretary moved for a judgment upon the pleadings, for sum-

mary judgment, or for an order enforcing the subpoenas (R. 36). The motions for judgment on the pleadings and for summary judgment were denied and the District Court set the matter down for a hearing on the issue of whether the Act applies to the operations of the corporate petitioner in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons (R. 63-65).

The Secretary then amended her complaint to add allegations that persons employed in the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons were engaged in producing articles used in performance of the contracts, and renewed her motions for summary judgment and for judgment on the pleadings (R. 65-67). In April, 1941 a hearing was held before the District Court on the issue of the coverage of the Act. The District Court found that on the evidence on this issue the manufacture of leather, rubber heels, rubber soles, cut soles, counters and cartons was not a part of the manufacture of shoes and that accordingly the Act does not apply to those operations of the corporate petitioner (R. 278-284). On October 27, 1941 a final order was entered which denied the Secretary's motions and dismissed her complaint and application.

On appeal to the United States Circuit Court of Appeals for the Second Circuit it was held that these subpoenas *duces tecum* should be enforced on the pleadings. It was held that if the complaint alleges coverage, though it be denied, a hearing on that issue should not be held, as the District Court has no power to inquire into the coverage of the Act; the subpoenas *duces tecum* must be enforced without further question (R. 298-332).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that the District Court must enforce the subpoenas *duces tecum* on the allegation, though it be denied, that the Act applies to the operations of the petitioner in its factories plants manufacturing leather, rubber heels, rubber soles, cut soles, counters and cartons.

2. In holding that a hearing should not be held to determine the applicability of the Act in a proceeding in the District Court brought to enforce subpoenas *duces tecum*, even though the applicability of the Act is in issue in the action.

3. In reversing the decrees of the District Court.

SUMMARY OF ARGUMENT

I. *Congress intended that a District Court should determine the issue of jurisdiction before enforcement of an administrative subpoena.*

The issuance of a subpoena is a judicial act and carries with it the power to punish for non-compliance therewith. If Congress did not intend a district court to determine the coverage of the Act, *i.e.*, jurisdiction of the administrative body, when called upon to enforce a subpoena it would have given the administrative body the judicial power to enforce its own subpoena. This it has never done. If the Court cannot determine the right of the administrative agency to issue the subpoena, including a determination of its jurisdiction, the Court's function is not a judicial one.

II. *Denial to the District Court of power to determine jurisdiction on the application to enforce an administrative subpoena duces tecum, violates the Fourth Amendment to the Constitution.*

The Fourth Amendment forbids an unlawful search or seizure. A search and seizure by an administrative agency which does not have jurisdiction is an unlawful search and seizure. Since the search and seizure occurs when the subpoena *duces tecum* is enforced, if the jurisdiction of the administrative agency is not determined judicially before the documents have to be produced, there is no constitutional protection against an unreasonable search and seizure. The Fourth Amendment is, therefore, rendered completely futile.

III. *The Construction of the Act by the Circuit Court of Appeals as to the powers of the District Court violates Article III of the Constitution.*

Article III of the Constitution, as interpreted by this Court, confines the powers of District Courts to those of a judicial nature. The enforcement of an administrative subpoena is not a judicial function unless the District Court has power to determine the issues passed upon by it in this case.

IV. *The arguments advanced by the Circuit Court of Appeals to support its conclusion, not previously dealt with in this brief, are unsound.*

The Circuit Court of Appeals has advanced several arguments to support its conclusion which have not been discussed in the chapters of this brief on the intention of Congress and on the application of the Constitution. These arguments are unsound.

V. *The Act does not apply to the manufacture of leather, rubber goods and cartons under contracts for the sale of shoes.* The District Court, having found that the Act does not apply to the manufacture of leather, rubber goods, counters and cartons, its determination of this question of fact should not be upset by an appellate court unless "clearly erroneous".

The evidence in this case shows clearly that manufacture of leather, rubber goods, cut soles, counters and cartons is not subject to the Act and that the decision of the District Court is correct.

ARGUMENT

I

CONGRESS INTENDED THAT A DISTRICT COURT SHOULD DETERMINE THE ISSUE OF JURISDICTION BEFORE ENFORCEMENT OF AN ADMINISTRATIVE SUBPOENA.

Congress did not intend that a District Court should enforce compliance with a subpoena *duces tecum* without inquiring into the applicability of the Act, which of course determines the jurisdiction of the administrative agency issuing the subpoena. No court has ever held that it so intended except the court below* and many courts, including this one, have held to the contrary.

The case of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 (1894) is a landmark in administrative

*The justification which the Circuit Court used for departing from the holdings of this Court is that its decision is more in conformity with the "trend" of this Court's recent decisions concerning administrative bodies (R. 315-317).

law, frequently cited today, and is directly contrary to the opinion of the court below.* There the Interstate Commerce Commission petitioned the Circuit (District) Court to enforce a subpoena under Section 12 of the Interstate Commerce Act, as amended (26 Stat. 743). The defendants contended that when a court was called upon to enforce an administrative subpoena, it was called upon to perform a non-judicial function; that the enforcement of an administrative subpoena was an administrative act and that accordingly Section 12 of the Act was unconstitutional. This Court denied that contention on the ground that the court was called upon, in such a proceeding, to perform a judicial function. The Court said at page 479:

> "Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, *nor to any matter which the Commission is entitled under the Constitution or laws to investigate.* These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits." (Emphasis supplied)

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*Yet, strangely enough, this case was not even referred to in the opinion of the court below.

The Court further stated that subpoenas must be enforced "if such matter is one which the Commission is legally entitled to investigate . . ." (p. 476). The entire opinion in this case is "instinct with an obligation" of a District Court to determine the authority of administrative agencies before enforcement of subpoenas, if that authority is challenged.

Harriman v. *Interstate Commerce Commission*, 211 U. S. 407 (1908) applied the principles laid down in the *Brimson* case, *supra*. There it was held that certain questions propounded to a witness in a proceeding before the Interstate Commerce Commission were improper. The questions were designed to produce evidence on a subject not within the Commission's authority. This Court therefore passed upon the coverage of the Act, the jurisdiction of the Commission and the validity of evidence while proceedings were pending before the Commission.

Ellis v. *Interstate Commerce Commission*, 237 U. S. 434 (1915). It was there held that questions were improper if not designed to show that a company, not subject to the jurisdiction of the Commission, was being used as a secret device for evading jurisdiction. The Court therefore again passed on the jurisdiction of the Commission, the coverage of the Act and the validity of evidence when proceedings were pending before the administrative body.

In *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1 (1936), this Court held that the validity of proceedings before the Securities and Exchange Commission could be raised when the Commission sought to enforce subpoenas issued in that proceeding. In both *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938) and *Federal Power*

Commission v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938), this Court stated, in effect, that if an administrative agency applied to a court for enforcement of a subpoena "appropriate defense may be made". The opinion of the Circuit Court of Appeals in the case at bar interprets these statements to mean only that "there could be no enforcement of the subpoena if the administrative proceeding, had in some manner, been ended" (R. 317). The Circuit Court has therefore very narrowly construed the language of this Court and held that "appropriate defense" must be limited to the single defense that the administrative proceeding has been ended. Such a confinement of this Court's language is not justified. It is directly contrary to the holdings of this Court in the *Brimson, Ellis* and *Harriman* cases, *supra*.

In *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 122 F. (2d) 450 (C. C. A. 6th, 1941), *Cudahy Packing Co.* v. *National Labor Relations Board*, 117 F. (2d) 692 (C. C. A. 10th, 1941) and *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. (2d) 596 (C. C. A. 6th, 1942)*, the Circuit Courts of Appeals held that before administrative subpoenas should be enforced the District Court must find whether the Act applied to the defendant and whether the Act is constitutional, if those points are put in issue by the answer. In the *General To-*

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*There are several decisions of the District Courts which are contrary to the decision of the Circuit Court of Appeals in the instant case. These include *National Labor Relations Board* v. *New England Transp. Co.*, 14 Fed. Supp. 497 (1936); *Securities and Exchange Commission* v. *Tung Corporation*, 32 Fed. Supp. 371 (1940); *Gates* v. *Graham Ice Cream Co.*, 31 Fed. Supp. 854 (1940).

bacco & Grocery Co. case, *supra,* the Court said, at page 599:

> "An administrator must restrain himself within the bounds of his delegated authority. It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects."

In *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97, 100 (C. C. A. 5th, 1936), certiorari denied 299 U. S. 559, the Court said:

> "The appellants can have a recognition of all their just rights under the scheme of procedure set up by the act. Even in advance of a final order by the Board, jurisdiction can regularly be brought under judicial scrutiny, because no subpoena can be enforced nor any document or book be compelled to be produced, nor any other order enforced save by appeal to a court, which would then and there refuse to sanction or aid any clear usurpation."

In *E. I. Dupont deNemours & Co.* v. *Boland,* 85 F. (2d) 12, 15 (C. C. A. 2d, 1936), the Court said:

> "Appellants' right to contest the examination of records or the compulsion of testimony may be asserted when application is made to enforce a subpoena. Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160, 47 S. Ct. 553, 71 L. Ed.

978; Federal Trade Commission v. Maynard Coal Co., 77 App. D. C. 297, 22 F. (2d) 873."*

The case of *Fleming* v. *Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7th, 1940), certiorari denied 311. U. S. 690, related to a subpoena challenged, not because of jurisdiction or coverage, but only on the ground that it was to be used in a general investigation and not for a specific charge of violation of the Act. The opinion of the Court contains no language which indicates that a subpoena should be enforced wholly apart from, and without consideration to, the applicability of the statute. Indeed, the opinion states that a subpoena should be enforced only when issued by "duly constituted authority". Certainly, a subpoena issued by a body having no jurisdiction is not a subpoena issued by "duly constituted authority".

If a mere allegation of jurisdiction is sufficient for the enforcement of an administrative subpoena, then Congress

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*Cf. *Cudahy Packing Co.* v. *Fleming*, 122 F. (2d) 1005 (C. C. A. 8th, 1941), where it was held that a subpoena should be enforced which called for records of a plant engaged solely in intrastate commerce. In this case, however, it appeared that the defendant also had a plant engaged principally in interstate commerce and it was contended by the administrative agency that some of the employees in the plant engaged solely in intrastate commerce were concerned with the goods manufactured in the interstate commerce plant. In other words, there was a mixture of employees and the administrative agency could not decide which employees came within its jurisdiction and which did not, without the records of both plants. So in the case at bar, the records of all the employees in the shoe factories have been furnished, and may be demanded by the Secretary even though many of the employees are exempt under the terms of the Act.

would have given the power to the administrative agency to enforce its own subpoena. This it has not done.* Fur-

*Apparently in all statutes the agency may obtain enforcement of subpoenas only by invoking the aid of a Federal Court. *Federal Trade Commission Act*, 38 Stat. 722, 15 U. S. C. §§ 49, 50; *Fair Labor Standards Act*, 52 Stat. 1065, 29 U. S. C. § 209, adopting the provisions of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. §§ 49, 50; *The Interstate Commerce Commission Act*, 25 Stat. 859, 49 U. S. C. § 12(3); *Bituminous Coal Act of 1937*, 50 Stat. 86, 15 U. S. C. § 838; *National Labor Relations Act*, 49 Stat. 456, 29 U. S. C. § 161(2); *Packers and Stockyards Act*, 42 Stat. 168, 7 U. S. C. § 222, adopting the provisions of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. §§ 49, 50; *Veterans Administration Act*, 49 Stat. 2033, 38 U. S. C. § 133; *Railroad Unemployment Insurance Act*, 52 Stat. 1107, as amended, 45 U. S. C. § 362(b); *Merchant Marine Act*, 49 Stat. 1991, 46 U. S. C. § 1124(b); *Federal Power Act*, 49 Stat. 857, 16 U. S. C. § 825f(c); *Securities Act of 1933*, 48 Stat. 87, 15 U. S. C. § 77t(c); *Securities Exchange Act of 1934*, 48 Stat. 900, 15 U. S. C. § 78u(c); *Public Utility Holding Company Act*, 49 Stat. 831, 15 U. S. C. § 79r(c); *Communications Act*, 48 Stat. 1096, 47 U. S. C. § 409(c), (d); *Civil Aeronautics Act of 1938*, 52 Stat. 1021, 49 U. S. C. § 644(c); *Motor Carrier Act*, 49 Stat. 550, 49 U. S. C. § 305(d), incorporating provisions of the Interstate Commerce Act, 25 Stat. 859, 49 U. S. C. § 12(3); *Longshoremen's and Harbor Workers' Compensation Act*, 44 Stat. 1438, 33 U. S. C. § 927(b).

The final report of the United States Attorney General's Committee on Administrative Procedure (1941) states that the aid of Federal Courts must be invoked for the enforcement of subpoenas and regarding enforcement of subpoenas, states, at page 414:

> "Some agencies are authorized to apply directly to the courts, while others may seek judicial aid only through the Attorney General, or a United States District Attorney."

The report analyzes the statutes creating 29 separate agencies. In none of them is the agency itself given the power to enforce its subpoena.

In Eberling "Congressional Investigations" (1928), it is stated, at page 392:

> "It is a fundamental fact in a discussion of the inquisitorial powers of such administrative bodies that they cannot themselves compel a witness to appear before them and testify. The same rule applies, as has been noted, to investigating com-

thermore, it is doubtful if it could do so. In *Interstate Commerce Commission* v. *Brimson, supra,* at page 485, this Court said:

> "The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment."

If the invalidity of the subpoena appears on its face, a simple motion to quash the subpoena would be sufficient. *Schurichi* v. *McNutt* v. *Willis,* 26 F. (2d) 388 (1928); *Electric Vehicle Co., et al.* v. *Craig Toledo Motor Co., et al.,* 157 Fed. 316 (1907); *Rubel* v. *Beaver Falls Cutlery Co.,* 22 Fed. 282 (1884); *United States* v. *American Bell Telephone Co. and others,* 29 Fed. 17 (1886); see also *Federal Rules of Civil Procedure,* § 45(d).

The power of Congress itself to enforce a subpoena which calls for documents or which relates to a matter

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mittees acting on authority of Congress. "The courts have said, 'In a judicial sense there is no such thing as contempt of a subordinate administrative body * * * and the power to compel performance of a legal duty imposed by the United States can only be exerted under the law of the land, by competent judicial tribunal having jurisdiction in the premises' (*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 489, 1894). Hence the enforcement of the power conferred on these tribunals to compel testimony must therefore be reposed in the courts."

outside of its jurisdiction can be questioned. *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880); *In re Chapman*, 166 U. S. 661 (1897); *McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929); *Jurney* v. *MacCracken*, 294 U. S. 125 (1935). In *Kilbourn* v. *Thompson, supra*, this Court said that Congress did not have power to enforce a subpoena unless the witness'

> "* * * testimony is required in a matter into which that House has jurisdiction to inquire * * *." (p. 190)
>
> "If they [Houses of Congress] are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown * * *." (p. 197)

In *In re Chapman, supra*, this Court decided that although a statute made punishable any deliberate refusal to answer "any question pertinent to the matter of inquiry in consideration"

> "* * * the word 'any', as used in these sections, refers to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon." (p. 667)

Administrative agencies have no inherent subpoena power. *Cudahy Packing Company* v. *Holland*, 315 U. S. 357 (1942). An administrative agency is a statutory body and has no powers not specifically given it by the Legislature. *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S. 452, 470 (1910); *Anderson* v. *Dunn*, 6 Wheat. 204, 233 (1821); von Bauer, *Federal Administrative Law*, Vol. 1, page 65.

* * *

We now turn to the language of the Act (Sec. 5). The Secretary is authorized "on complaint of a breach or violation of any representation or stipulation" provided in the Act "to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath". The Act, thus, does not give the Secretary a general authority but a specific authority—one limited to the breach or violation of any representation or stipulation provided in the statute.

In the event of contumacy, failure or refusal of any witness to obey the order of the Secretary, then the Act provides:

> "* * * any District Court of the United States * * * shall have jurisdiction to issue to such person an order requiring such person to appear * * *, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof;"

The Act thus in normal language gives jurisdiction to the District Court. The jurisdiction that can be given to the District Court is determined, of course, by Article III of the Constitution:

> "* * * it is not open to question that the judicial power vested by Article III of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs." (*Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, 74).

The Constitutional Courts of the United States cannot be given any jurisdictional power that is legislative or administrative as contrasted to judicial. The jurisdiction granted to them must be judicial. Thus, when Congress in Sec. 5 of the Act granted the District Court jurisdiction it must be assumed that it obeyed the Constitution and granted it jurisdiction that was judicial and only judicial, and there is not the slightest indication that Congress intended otherwise.

When an applicant's claim for relief is challenged on the ground of the applicant's lack of capacity to claim the relief or lack of right to the relief, then the regular judicial proceedings for the establishment and enforcement of rights requires that that challenge be determined. If the District Court were bound to enter an order for the relief requested, regardless of any challenge thereof, it would not be a court exercising judicial functions but it would be an agency performing ministerial duties which are not the function of a court and which under the Constitution may not be given to a District Court.

Let us note just what the issue is.* The petition of the Secretary made it clear. Admittedly, the shoes were made only in the shoe factories at Binghamton and Johnson City. The evidence sought is with respect to other plants, which admittedly were not even shoe plants, and jurisdiction of those plants is claimed only because they tanned leather, etc., some of which ultimately found its way into the shoes covered by the contracts. Note that the application calls for records with respect to "calfskin tannery", "upper leather tannery", "sole leather tannery", etc. (R. 5).

*It should be noted that the evidence under subpoena is not sought to determine or establish jurisdiction, but to determine violation.

In the case at bar the contracts called for the manufacture of shoes in specific factories, and the Secretary seeks under the Act to secure the records of the calfskin tannery, for no reason other than that some of the calfskin tanned went into the shoes. Unless the Act covered the tannery, *i.e.*, unless the representations or stipulations of the contract covered the tannery, there is no breach or violation within the jurisdiction of the Secretary for investigation.

From the standpoint of the District Court, when the Secretary petitions it for relief which the Corporation challenges, a normal exercise of the judicial process requires the Secretary to show his authority to demand relief. Neither the Secretary nor anyone else can require a District Court to grant an order for the examination of a person's books and records without showing the Court due authority for the request. If the applicant has no authority to justify the application, it must be denied. Hence, essentially, at the threshold there always lies the question of the authority for the applicant's request, and if judicial action is to be had, that question must be first determined if put in issue. Thus, the Secretary in our case sought to justify her demand for the records of the tannery by alleging a contract for the manufacture of shoes in a shoe factory. The Corporation denies that its contract or its representations or stipulations had anything to do with the tannery or the product of the tannery, and thus asserts that the Secretary is going beyond the powers granted by the Act. If the Corporation is right that the Act did not authorize this proceeding by the Secretary, then there is no basis for the granting of the Secretary's petition. It would seem to be inevitable that if this question is raised it must

be decided, if the Court is exercising judicial jurisdiction. There is nothing to indicate that Congress intended, or even could have intended, the District Court of the United States to do otherwise.

The Court below necessarily belied its own principles. It had to admit that if the Secretary's petition did not allege that there was a contract under the Act the Court should not proceed; but apparently if the Secretary alleges that fact, then, regardless of its denial, the Court must proceed. In other words, we have the anomalous situation that the Court must grant relief not because of the fact but because of what a petitioner says the fact is. The Secretary would have the statute construed as though it read: "Any District Court of the United States shall forthwith order the production of any evidence that the Secretary may demand, upon the petition of the Secretary alleging that he is entitled to such evidence, and the allegations of the Secretary's petition shall be irrebuttable." Congress did not say that; it never has said it in any statute. Congress has never even attempted to limit the jurisdiction of the courts in passing upon the enforcement of its own subpoenas. Congress in the Act has granted the District Court jurisdiction just as it regularly grants jurisdiction in other situations—a jurisdiction of the type and quality required by Article III of the Constitution—a jurisdiction which consists of, and is limited to, the exercise of the judicial function.

We urge that the construction urged by the respondent is erroneous without resort to the Constitution; but the error is even more manifest when the Act is read against the background of Article III and the Fourth Amendment.

II

DENIAL TO THE DISTRICT COURT OF POWER TO DETERMINE JURISDICTION ON THE APPLICATION TO ENFORCE AN ADMINISTRATIVE SUBPOENA *DUCES TECUM* VIOLATES THE FOURTH AMENDMENT TO THE CONSTITUTION.

It is unnecessary for this Court to hold that the Act requires enforcement of a subpoena *duces tecum* by a District Court without a hearing to determine the jurisdiction, if in issue, of the administrative agency constitutes an unreasonable search and seizure. Under the principle that a statute will not be interpreted so as to lead to a result which is or might be unconstitutional if another interpretation is available (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1936)), the duty of the District Court should be held to be as claimed by us in Point I.

Under the opinion of the Circuit Court of Appeals and the result reached by that Court, enforcement of the subpoena *duces tecum* would undoubtedly constitute an unreasonable search and seizure in violation of the Fourth Amendment. *Boyd* v. *United States*, 116 U. S. 616 (1886); *In re Pacific Ry. Com'n.*, 32 Fed. 241 (C. C., N. D. Cal., 1887); *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298 (1924). The subpoena *duces tecum* calls for the production of documents. If the agency has no jurisdiction or authority the production of the documents is clearly unlawful. (*Interstate Commerce Commission* v. *Brimson, supra*; *Jones* v. *Securities and Exchange Commission, supra*). If

the District Court has no power to determine beforehand the jurisdiction or authority of the administrative agency, there can be no review at any time of the jurisdiction of the administrative agency before the documents have been produced. *The production of the documents constitutes the search and seizure. A review after they have been produced, if their production is unlawful, is too late. At that time there has already been a violation of the Fourth Amendment.* The situation would be exactly the same as though Skinner in *Skinner* v. *Oklahoma*, . U. S. (86 L. Ed. 1130) (1942) had been rendered sterile before the order of this Court holding the sterilization statute invalid.

If the petitioners refuse to produce the documents after a court order (as they have refused to produce them when ordered by the administrative agency) they would be subject to a penalty for contempt of court. They would therefore be subject to a deprivation of their liberty from search and seizure without a judicial hearing and without a determination that the documents pertained to a subject which the administrative agency had the authority to inquire into.

The Act here involved, unlike some other Acts, permits an examiner holding the hearing to issue subpoenas. If the subpoena *duces tecum* issued by the examiner (a subordinate official of the Department of Labor)* be enforced without judicial action on the asserted objection of the Company, *there is no judicial protection against violation of the Fourth Amendment.* The Fourth Amendment was de-

*The examiners average 36 years of age; their salaries vary between $3,200 and $5,400 per annum. (Final Report of the Attorney General's Committee on Administrative Procedure, page 392.)

signed to protect citizens from unlawful searches and seizures. Its history has been judicially noted.

United States v. *1013 Crates, etc.*, 52 F. (2d) 49, 51 (C. C. A. 2nd, 1931).

> "The Fourth Amendment which prohibits unreasonable searches and seizures, is one of the pillars of liberty so necessary to a free government that expediency in law enforcement must ever yield to the necessity for keeping the principles on which it rests inviolate. In this spirit alone it is safe to attempt to solve the problem which now confronts us.
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> "One of the things, which no great study of the history of the times which led to the adoption of this amendment will reveal, is an abhorrence of searches and seizures based on nothing but the desire to bring to light and into the clutches of the law whatever may, by chance, be found. No period of freedom from such an evil, however long it may be, should lull us into a false sense of security and lead us to permit this always necessary safeguard of liberty to be weakened in exchange for the temporary advantage of more thorough or certain enforcement of some law, however beneficial."

In the dissenting opinion of Mr. Justice Brandeis, in the case of *Olmstead* v. *United States*, 277 U. S. 438, 479 (1928), he stated:

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty

> lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

In *Sinclair* v. *United States, supra,* the Court said, at page 292:

> "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. In order to illustrate the purpose of the courts well to uphold the right of privacy, we quote from some of their decisions."

Surely the application of the Fourth Amendment to the Constitution cannot be relegated to the final decision of a subordinate official of an administrative agency.

In a brief filed with this Court in the case of *Cudahy Packing Company* v. *Holland,* 315 U. S. 357 (1942), the Department of Labor stated that to satisfy the requirements of the Fourth Amendment a subpoena must relate to production of documents "which appear to be relevant to a lawful subject of inquiry". If the administrative agency is not authorized to conduct the hearing certainly the production of documents for use in that hearing does not relate to "a lawful subject of inquiry"; also the issue of whether they "appear to be relevant" must be decided. Therefore, even if we should accept this statement, the District Court nevertheless must decide these questions before compelling the production of the documents. If the District Court is prohibited from deciding even these questions, the protection of the Fourth Amendment disappears.

* * *

Respondent has likened the proceedings here to a Grand Jury investigation, but that analogy gives the respondent no aid.

In *Hale* v. *Henkel*, 201 U. S. 43 (1906), the proceeding originated in a subpoena *duces tecum* commanding Hale to appear before the Grand Jury. The Supreme Court said (p. 76):

> "We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. * * * the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum*, against which the person, be he individual or corporation, is entitled to protection."

The Court examined the subpoena and found it too broad, saying:

> "A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms."

This is a direct refutation of the Secretary's position in the case at bar. The Supreme Court rejected the view that a court had to enforce a subpoena *duces tecum* if issued by a Grand Jury, because of the protection of the Fourth Amendment. The analogy to a search warrant that was drawn by the Supreme Court is illuminating. Under the Fourth Amendment the Company in the case at bar is entitled to the same protection against a subpoena *duces tecum* issued by an administrative agency as it would be against a search warrant issued by an administrative agency.

III.

THE CONSTRUCTION OF THE ACT BY THE CIRCUIT COURT OF APPEALS AS TO THE POWERS OF THE DISTRICT COURT VIOLATES ARTICLE III OF THE CONSTITUTION.

The decision of the Circuit Court of Appeals is this: When an administrative officer applies to a District Court for an order for the production of testimony, and his petition contains allegations of fact or of law or of mixed fact and law to the effect that he is entitled to his relief, then the District Court must grant it, regardless of the challenge of those allegations; the District Court cannot decide the issues presented; it must accept the allegations as correct, including those of law as well as of fact; or, to put it more realistically, it must act as requested, regardless of the correctness of the allegations. If the applicant's petition is in the correct form the District Court must grant it; it cannot pass on questions of fact or law although put in issue.

This raises squarely the issue whether the jurisdiction of the District Court, as so determined, is in conformity with Article III of the Constitution.

Keiler v. *Potomac Electric Co.*, 261 U. S. 428 (1923) is one of numerous instructive cases. The power there in question the Supreme Court held might be properly vested in the Courts of the District of Columbia under Clause 17, Sec. 8, Article I of the Constitution, but could not be vested in the Supreme Court or in the inferior courts of the United States under Article III of the Constitution. The Court said:

> "Such legislative or administrative jurisdiction, it is well settled cannot be conferred on this Court

> either directly or on appeal. * * * The principle there* recognized and enforced on reason and authority is that the jurisdiction of this Court and of the inferior Courts of the United States ordained and established by Congress under and by the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them * * *".

This Court in that case found it necessary to define what constituted judicial power, and it quoted from an earlier decision as follows (p. 440):

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end."

Thus, we are given a criterion in determining the constitutionality of a power asserted to be lodged in a District Court.

In *Liberty Warehouse Co.* v. *Grannis, supra,* this Court expressed the concept in these words:

> "* * * in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights or the prevention, redress, or punishment of wrongs."

In a long line of cases this Court has settled the law to be:

> "The jurisdiction and duties of the Supreme Court and Circuit Court of Appeals are similar in all respects to those of the District Court. Neither has

Muskrat v. *U. S.*, 219 U. S. 346 (1911).

> any power or function other than what is strictly judicial." (*Commissioner* v. *Havemeyer*, 296 U. S. 506, 518 (1936).

We do not seek to burden the Court with the citation of further authority for principles which have been clearly established in these and many other cases, but it is peculiarly relevant and instructive to examine the case in which this Court first held that the grant of jurisdiction by Congress to the Federal Courts to enforce subpoenas of an administrative agency was permissible under Article III. We refer to *Interstate Commerce Commission* v. *Brimson, supra.* This Court overruled the argument that this power could not be given to the District Courts because it found that there was a controversy which called for the exercise of the judicial power.

> "Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or produce books, papers, etc. in his possession, is or is not in violation of his duty or in derogation of the rights of the United States seeking to execute a power expressly granted to Congress, are distinct issues between that body and the witness. * * * And these issues made in the form prescribed by the Act of Congress are so presented that the judicial power is capable of acting on them" (pp. 476-7).

Thus, this Court sustained the jurisdiction of District Courts to enforce administrative subpoenas only because this Court found that the issue which the Company sought to raise in this case, could be raised. It was the presence of such issues that made the judicial power capable of action. Hence, the denial of the power to the District Court

to act upon such issues removes the only basis for sustaining the constitutionality of the grant of jurisdiction.

We urge that the power exercised by the District Court in our case was rightfully exercised; that if the power of the District Court is to be limited as ruled by the Circuit Court of Appeals, then the District Court would not be performing a judicial function, and the grant of jurisdiction to a District Court to perform only that which the Circuit Court of Appeals would permit, would be a violation of Article III of the Constitution. The power which the District Court exercised was a *sine qua non* to constitutional jurisdiction in the Federal Court.

IV

THE ARGUMENTS ADVANCED BY THE CIRCUIT COURT OF APPEALS TO SUPPORT ITS CONCLUSION, NOT PREVIOUSLY DEALT WITH IN THIS BRIEF, ARE UNSOUND.

In the foregoing points in our brief we deal with some of the arguments advanced by the Circuit Court of Appeals in support of its decision. We deal now with other arguments advanced by that Court in its opinion.

It will be noted that the Court below paid very little attention to the Fourth Amendment, and by completely ignoring *Interstate Commerce Commission* v. *Brimson* it avoided dealing with Article III of the Constitution.

(a) The principle of *Cogen* v. *United States*, 278 U. S. 221 (1929), and cognate cases cited in the opinion has nothing to do with the issue at bar. These cases dealt with the problem of right of appeal after the party had had one judicial determination of the issues raised by him as to his tes-

timony and books and records. The Constitution does not grant anyone the right of appeal. In the cases to which the lower Court refers the party had already received that which the Court would deny to Endicott Johnson Corporation, namely, a judicial hearing and decision on the issues raised. Those cases dealt merely with the right to appeal from an adverse decision.

In those cases as well as in *Alexander* v. *United States*, 201 U. S. 117 (1906) and *Cobbledick* v. *United States*, 309 U. S. 323 (1940) there had already been a judicial hearing and determination of the issues that the party wished to raise, and the only question up for decision was whether there was an immediate right to appeal. Even in these cases it is interesting to note that this Court has held that where the issue arises from the enforcement of a subpoena of an administrative agency the right to appeal is immediate. The cases in which the right to appeal is not immediate are where the subpoena has been issued out of a Court (See *Perlman* v. *United States*, 247 U. S. 7 (1918), as explained in *Cobbledick* v. *United States*).

(b) The Court below suggests (R. 310) that it really does not do the party any harm to compel him to produce his books and to give testimony, because if the final decision of the Administrator is wrong on the merits this decision can be corrected on judicial review. It is obvious that this argument completely ignores the Fourth Amendment. It is an argument that there is no objection to an unreasonable search and seizure, provided the Court can ultimately see to it that the judgment of the Administrator on the merits is correct. The Fourth Amendment is not so conditioned; if it were so conditioned most of its meaning would be gone. The Fourth Amendment is not designed to

protect a person against an erroneous judgment for damages; it is to protect his freedom from unlawful search and seizure.

Incidentally, we should point out that the Court below is in error in implying that the Corporation has the right of judicial review of the determination of the Secretary, for this is one Act in which the customary provision for review is lacking. If the Secretary decides against the Corporation, and puts it on the "Black List" by way of penalty, it is by no means clear that there is anything that the Corporation can do about it. Certainly, the statute purports to give it no rights. It is only if the Secretary determines to assess money damages against the Corporation and turns the case over to the Attorney General, and the Attorney General, in the exercise of his discretion, decides to bring suit, that the Corporation is given a right to review the action of the Secretary. However, the right to review an assessment of damages—or, for that matter, an ultimate dismissal of the case by the Secretary—would be no justification for a violation of the Fourth Amendment.

(c) The Court below advances the argument (R. 311) that "today the administrative and judicial processes are specifically said to be collaborative". But the issue here presented is not whether they shall be collaborative, but whether the judicial process shall be subordinate to the administrative process, *i.e.*, whether when the Administrator asks for the production of evidence the Court must grant the request without exercising the judicial process. When the Courts involved are the District Courts and the other constitutional Courts of the United States, their power must be tested by Article III of the Constitution, which the Court below ignored. According to the Court below, when the admin-

istrative agency decides that an Act applies to the situation, the District Court must help the agency; that is not collaboration, for the administrative agency would have done all the deciding and the District Court would have been merely the "rubber stamp". Such an abnegation of judicial power is not permissible.

(d) The Court below stressed the importance of promptness (R. 312) and the desirability of expedition (R. 316).

This argument is older than the Bill of Rights—probably it is one of the reasons why we have the Bill of Rights. The nations which do not have it, have at times presented us with spectacles of judicial and administrative officials apparently attaining ends faster than do those of the United States and England. There is the query whether in the end there is more speed; but regardless of that query it is basic in the legal systems of these two countries that there is something more fundamental and more desirable than speed in any particular case. It is but another form of arguing that the end justifies the means. The impatient administrative official and the impatient prosecuting attorney will, now and again, be slowed up by the Bill of Rights, and sometimes even thwarted in their objectives; but that is the price we have been willing to pay for the Bill of Rights, and it is generally believed that the price is a small one. No one denies the desire for speed in the administrative process, but it cannot be at the expense of the denial of the right of freedom from unlawful search and seizure.

Furthermore, Article III of the Constitution must be considered here, as in other situations in the past where it was sought to ignore it to attain aims that seemed desirable. But the District Court of the United States cannot be

made a "rubber stamp" of an administrative official because it will enable that official to act more promptly. The argument that the Court has here used would sustain the grant of power to the administrative agency to enforce its own subpoenas, for that certainly would be still speedier than having to use the Court as a "rubber stamp".

Finally, it is far from clear that the decision of the lower Court does make for speed, if we look at the ultimate goal rather than the preliminary steps toward it. In the case at bar the fundamental question which should be decided (and which the Court below claims must ultimately be decided) is whether the Act applies to the tanneries, etc. The Court below seemed to think that time would be saved by postponing the decision of that question until all the evidence was gathered and long and expensive proceedings were had. It would seem more plausible, however, that the decision of the basic question at the outset might well save much time, trouble and expense. It is upon that line of reasoning that the common law evolved the demurrer and modern practice favors the early motion to dismiss, for if plaintiff does not really have a cause of action, why waste time going to trial? Certainly, it is difficult to assert that the views of the Court below as to what will be speediest are so inescapably true that one should be tempted to cut short corners with the Fourth Amendment and the Third Article of the Constitution.

(e) The Court below suggests that because the Corporation could not enjoin the Secretary's proceeding, therefore, it could not be heard to set up any defense or assert any rights when the Secretary brought this proceeding against it. That would seem to be an obvious *non sequitur*. The Fourth Amendment is a shield, and not a sword. There

are innumerable situations in which a party has a complete defense but cannot stop the institution of proceedings. The common-sense reason for this is clear. A person is not constitutionally harmed by the institution of a proceeding, but the harm comes when he is unreasonably required to produce documents and records. There is no constitutional protection against being sued; the protection is against unreasonable search and seizure.

Furthermore, the very cases in this Court, cited by the Court below on this point belie its own statement. They point out clearly the situation of a person who has moved in vain to quash a subpoena. They point out that in certain instances he may not appeal from the order, but what he can do is refuse to obey the order, and then appeal from the order holding him in contempt. Surely, these cases actually hold to be correct, what the Court below refers to contemptuously as "running around the end when blocked at the center". These cases show convincingly that there is no validity in the argument that because something cannot be accomplished in one way it cannot be accomplished in another.

The Court below has cited *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1; but that case, interestingly enough, refutes the argument of the Circuit Court of Appeals. Let us examine into what happened: Jones tried, first, to enjoin the Commission's proceeding, on the ground that it had ended. He was unsuccessful in so doing by the decision of the Second Circuit Court of Appeals (79 Fed. (2d) 617), and this Court denied certiorari (297 U. S. 705). But when the Commission undertook to serve him with a subpoena he was permitted successfully to attack the

enforcement thereof; and this Court held, in 298 U. S. 1, that the subpoena could not be enforced. In other words, this Court in that case did exactly what the Circuit Court of Appeals claims ought not be done.

The Court below conceded (p. 331) that

> "An administrative proceeding might on the face of the record, be so clearly without legal foundation that a Court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding."

Nevertheless, the law is clear that an administrative proceeding could not be enjoined on that ground. Thus, the Court itself shows that its criterion is not sound, for it agrees that a subpoena should not be enforced in a situation where the proceeding itself could not be enjoined.

(f) The Court below argues that the Administrator's officers "if not always themselves experts, are specialists, advised by experts". For that reason, that Court has said that great reliance should be placed upon their findings.

The Court cites *Gray* v. *Powell*, 314 U. S. 402 (1941). Indeed, that case will serve well the purpose of indicating the difference between what this Court had in mind in announcing the rule, and the situation in the case at bar. In the *Gray* case the Coal Director, after a protracted hearing with evidence submitted on both sides, found it to be the fact that a certain railroad was not a coal producer, and this Court refused to disturb that finding. The relevancy of that situation to the one at bar is difficult to see. Surely, the Corporation is not here arguing that weight be given to the Secretary's determination; it is merely objecting to the fact that it has not been allowed to question it. It may be that upon the argument as to coverage the question would

arise as to the weight to be given to any determination by the Secretary, but we are here objecting to the fact that the Corporation was not allowed to question it. The District Court has not been told what weight is to be given to any finding of the Secretary but has been told to treat it as final and irrefutable.*

However, if we look at the situation realistically there is no administrative fact-finding, as yet, in the case at bar. The Secretary's complaint sets forth that the Corporation entered into certain contracts for shoes with the Government, that in addition to its shoe factories it owns certain other plants, that in these plants it charges that some employees received less than the permissible minimum wages, that the Secretary has reason to believe that these employees were employed by the Corporation in performance of the Government contracts, that the Corporation has in its possession records that will show what compensation these employees received, that the Corporation has refused to produce those records and that the Secretary wants those records so that she can proceed to make determinations—which determinations, she points out, will, after being made, be conclusive in any Court of the United States if supported by the preponderance of the evidence (R. 2-7). Clearly, the Secretary has made no determinations, and it is difficut to see what those "specialists, advised by experts" could have done in this situation. In truth and in fact, the Secretary wanted merely to see if she could push the Act to cover not only the plant in which the goods contracted for were made but also the plant where were made the materials

*It should be noted that under the Act, the findings of the Secretary even after hearings are not made conclusive on the Courts unless supported by the preponderance of the evidence.

that went into those goods. All that the Secretary had done when she went into the District Court was to make charges; the only findings made were those made by the District Court. This case has still not reached a point where the Secretary has made findings; even then, we are not here arguing about the weight of any findings but as to their incontestability.

V

THE ACT DOES NOT APPLY TO THE MANUFACTURE OF LEATHER, RUBBER GOODS, COUNTERS AND CARTONS UNDER CONTRACTS FOR THE SALE OF SHOES.

The District Court found that the manufacture of leather, rubber goods and cartons was manufacture for stock not specifically for Government contracts (R. 282). This constitutes a finding of fact by the Trial Court which should not be disturbed unless it is clearly "erroneous" (Rules of Federal Procedure, Rule 52), *Warren* v. *Keep*, 155 U. S. 265 (1894), *Silver King Coalition Mines Co.* v. *Silver King Consolidated Mining Co.*, 204 Fed. 166 (C. C. A. 8th, 1913), cert. den. 229 U. S. 624. The rule of finality as to Trial Court findings of fact is applied in summary proceedings as well as in actions, *Macomber* v. *Hudspeth*, 115 F. (2d) 114 (C. C. A. 10th, 1940). The rule represents a practice that has long prevailed, *United States* v. *Still*, 120 F. (2d) 876 (C. C. A. 4th, 1941). It should not, therefore, be held that the Act applies to the corporate petitioner unless the finding of the Trial Court is demonstrated to be clearly erroneous. As we hereinafter show, the finding by the Trial Court not only accords with the

rulings of the Department of Labor under this very Act, announced at the time these contracts were being performed, but on the evidence is the only permissible conclusion.

(a) *Rulings of the Department.* During the period from October, 1936 until October, 1938 when these contracts were being performed by the corporate petitioner, the Department issued only two rulings concerning the coverage of the Act. The first ruling was in the form of a letter dated December 30, 1936, two months after the commencement of work by the corporate petitioner on the Government contracts in question (Ex. 4d, R. 198). This letter was written by the Acting Administrator of the Act to the International Harvester Company and was approved by the Acting Secretary of Labor. The Harvester Company had a number of contracts with the Government for the sale and delivery of trucks and maintained factories for the manufacture of trucks and also maintained factories for the manufacture of various parts which were later used in assembling the trucks at the truck factories. The Harvester Company asked the Department whether the factories for the manufacture of parts were subject to the Act. The Department ruled that those factories were not subject to the Act, stating in part:

> "Inasmuch as Congress limited the scope of the Act to manufacture of the articles required under the Government contract, your company would be complying with the Act on truck contracts if the truck factories were operated in conformity with the law."

The situation there ruled on was even stronger than the case at bar for there the parts manufactured could only

be used in specified trucks whereas here the leather or the rubber heels and cartons could be used in any footwear. From the date of this ruling until after the last contract had been partially performed by the corporate petitioner, only the records of the footwear factories were inspected or checked (R. 247) and no demand or request was made for the records of any other factory or plant.

The second ruling did not come to the petitioner's attention during the performance of these contracts. It concerns, however, the casting of ingots in the open hearth department of the Baldwin Locomotive Works. This ruling is also in the form of a letter dated January 9, 1937 (Ex. 4b, R. 189) and states:

> "* * * except as to those instances where the production of ingots is part of an uninterrupted process of manufacture in the case of Government goods, the employees in the open hearth department are not subject to the Walsh-Healey Act."

The production by the corporate petitioner of leather, rubber soles and heels, cut soles, counters and cartons is not a part of an uninterrupted process of manufacture of shoes in the case of Government footwear contracts. The leather, rubber soles and heels, cut soles, counters and cartons were not manufactured specifically for Government use. They were manufactured, primarily for civilian purposes and from such manufactured stock a small portion was later selected which was suitable for use in the manufacture of Government footwear (R. 141-143, 158, 159, 165, 166, 255).

These two rulings comprise the only rulings made by the Department until long after all the contracts in question were fully and completely performed. It is clear,

therefore, that the officials charged with the administration of this Act did not consider that it covered the manufacture of leather, rubber soles and heels, cut soles, counters and cartons by the corporate petitioner. It is well settled that the contemporaneous interpretation of a statute by those charged with its enforcement is entitled to great weight: *United States* v. *Jackson*, 280 U. S. 183 (1930), *Brewster* v. *Gage*, 280 U. S. 327 (1930); *United States* v. *American Trucking Association*, 310 U. S. 534 (1940), *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941).

Respondent has laid great stress on the subject of integrated industries, such as Endicott Johnson Corporation, stating that in such case all of the processes incident to the manufacture of the finished product are covered by the provisions of the Act. Under the rulings in effect at the time of the performance of the contracts in question no mention was made of integrated industries. It was not until the promulgation of the "Rulings and Interpretations No. 2", issued September 29, 1939, almost a year after the performance of the last contract, that integrated industries were referred to and a specific provision inserted holding all of the processes performed by such integrated industries to be covered by the provisions of the Act.

The failure of the Division to exercise a power which it would presumably be alert to exercise if it felt it possessed, should have great weight in determining whether or not the Act applies to the factories and plants in question and especially in view of the fact that almost three years elapsed from the time the corporate petitioner commenced work on the contracts in question before any official ruling of the Department was made holding the factories and plants in question to be covered.

The petitioner from time to time signed the contracts with the Government in the reasonable and justified belief that their representations and stipulations applied only to the factories in which the shoes were made.

(b) *Classification of Industries under Other Federal Acts.* The manufacture of footwear has always been classified and defined as separate and distinct from the manufacture of leather, the manufacture of rubber and the manufacture of paper cartons.

The Bureau of Census of the United States Department of Commerce in its census of manufacturers for the years 1935 and 1937 and in its preliminary report for 1939, classifies and defines the tanning and leather industry (other than rubber) and the foot and shoe cut stock and findings industry as separate and distinct industries (Exs. D, E and F, R. 269, 271, 273).

The Administrator of the Fair Labor Standards Act of 1938 has defined the shoe manufacturing and allied industries as a separate and distinct industry from the tanning of leather or the manufacture of rubber soles and heels (Ex. C, R. 268). A wage order applicable to the rubber products manufacturing industry became effective July 28, 1941. One for the leather industry became effective September 16, 1940.

Under this very Act a minimum wage has been established by the Secretary of Labor for the men's welt shoe industry (Ex. B, R. 267) and as a separate and distinct industry a minimum wage has been established for the leather industry (effective December 17, 1941).

Under the National Industrial Recovery Act a code of fair competition was established for the boot and shoe manufacturing industry and as the industry was therein

defined it did not include the tanning of leather or the manufacture of rubber soles and heels (Ex. G, R. 273). A code of fair competition was established also for the leather industry and as the industry was therein defined it did not include the manufacture of boots and shoes or the manufacture of rubber soles and heels (Exs. H and I, R. 274, 275). A code for the rubber manufacturing industry did not include the manufacture of boots and shoes or the manufacture of leather (Ex. J, R. 276).

From the foregoing definitions of industries, it is apparent that the Act cannot be held, and was not intended, to apply to the corporate petitioner's operations in its tanneries, manufacturing leather, or to its rubber plants and mills, manufacturing rubber heels and soles.

None of the foregoing definitions of industries include the manufacture of cartons. Their manufacture is part of the paper box manufacturing industry (R. 254).

(c) *The Processes in Question are not Normally Associated with Footwear Manufacture.* In determining what is the practice in an industry, the entire industry must be looked at. In the United States there are approximately 1,000 shoe manufacturers. In the vast majority of cases, these shoe manufacturers purchase their leather, and rubber soles and heels, and cut soles, counters and cartons from outside suppliers and confine their operations chiefly to the assembling and fabrication of the materials into the finished product (R. 254). At most there are not more than three or four manufacturers of shoes in the United States who, in addition to manufacturing the shoes, also tan their own leather, make their own rubber soles and heels, cut soles, counters and cartons. Therefore, looking at the industry as a whole, those processes are not normally or

usually part of the shoe manufacturing industry. They are entirely separate and distinct. There is, therefore, no factual basis for the respondent's view that the manufacture of leather, the manufacture of rubber soles and heels, the manufacture of cut soles, counters and cartons are part of the usual process of shoe manufacture.

Respondent also maintairs that the construction of the Act urged by the petitioners would defeat the purpose of the Act by restricting its benefits to the employees engaged in the final process of manufacture and that the contractor could avoid the Act by physically segregating those employees in a separate department away from those engaged in the processes antecedent to the final fabrication. The corporate petitioner has been operating its tanneries, rubber mills, sole cutting, counter and carton factories and plants as separate and distinct factories and plants since its incorporation in 1919 and no change was made in such operations prior to or subsequent to the enactment of the Walsh-Healey Public Contracts Act. Where the Contractor physically segregates the employees solely for the purpose of evading the impact of the Act the Contractor manifestly is employing a subterfuge which the Department can deal with in that situation when and if that situation arises.

(d) *A Very Small Percentage of Corporate Petitioner's Leather and Rubber was Used under the Contracts in Question.* During the period involved, only 16.2% of the upper leather produced by Endicott Johnson Corporation in its upper leather tanneries was used on Government contracts; only 4.2% of the upper leather produced in its calfskin tannery was used on Government contracts; only 4.9% of sole leather produced in its sole leather tannery was used on

Government contracts and only 3.4% of the rubber soles and heels produced in its rubber plants were used on Government contracts. In other words, from 84% to 97% of its production in tanneries and rubber plants was for commercial purposes (R. 222, 223, 224, 225, 226, 227, 255).

(e) *Application of the Act to Corporate Petitioner's Leather, Rubber and Carton Factories Would be Arbitrary and Unreasonable.* The regulations of the Department under the Act require separate records for employees engaged in the manufacture of goods sold under Government contract to those not so engaged.

It is impossible to separate the employees who produced leather, rubber heels and soles to be used in Government shoes under the contracts in question from those who produced the leather, rubber heels and soles to be used for commercial purposes during the period of the contracts in question, (1) because the leather which is used for leather soles on Government shoes is not selected until the cut soles have been sorted and graded as to defects and sizes, (2) because the hides which are to be used for upper leather in Government shoes are not finally selected until the same have been completely tanned, and (3) because the rubber heels and soles for the Government shoes are not selected until they have been sorted and graded as to defects and sizes (R. 255). Therefore, the regulation which would require separate payroll records to be kept for employees engaged in Government work as to these processes is impossible of performance (R. 255, 256). For example, a man spends a day in tanning leather—is he engaged in Government work? No one can possibly know until long afterwards when that leather or any part of it will at a different factory be put into footwear.

The standard form of bid under the Act is significant. The form provides:

> "Bidders must state in space provided below names and locations of the factories where manufacture of the item bid upon will be performed". (Ex. 1b, R. 177).

The corporate petitioner, in response to this provision, listed the factories at which the shoes were to be manufactured. The first contract between the Government and the corporate petitioner was made and performed in the fall of 1936. The respondent had inspectors at the factories listed by the corporate petitioner. The inspectors of course knew, or soon found out, that articles used in the manufacture "of the item bid upon" were manufactured in other factories. However, no question was raised as to the listing of factories in subsequent contracts nor did inspectors appear at any factories except the shoe factories.

The attempted application of the Act by the respondent is arbitrary and unreasonable.

(f) *The Manufacture of Leather, Rubber Soles and Heels, Cut Soles, Counters and Cartons Constitutes Manufacture for Stock.* During the period from 1936 to 1938, when the contracts in question were being performed, the production of leather, rubber soles and heels, counters and cartons were in reality production for stock, as distinguished from production of materials for use in the contract. From the Record, it definitely appears that there is no selection of leather for Government use at any time during the sole leather tanning process. The leather is completely tanned and sent to the stock room and when a supply of sole leather

is needed for Government shoes, it is ordered from the stock room according to thickness. There could be no clearer example of a manufacture for stock than that illustrated by the manufacture of sole leather (R. 157-165).

In the case of upper leather no selection is made during the tanning process for Government uses until the so-called blue stage and the selections made at that stage and thereafter are only tentative selections of hides which may be suitable for Government use (R. 137-155). What is true with respect to sole leather and upper leather is likewise true with respect to rubber plants making soles and heels (R. 255), the sole cutting departments (R. 159), the counter and carton departments (R. 165). None of these materials can realistically be said to be manufactured for anything except stock. The District Court, upon the facts produced at the hearing before it, correctly held:

> "I can place no other construction on the operations than that of manufacture for stock. I am unable to differentiate between a man going to a stock pile and selecting certain articles and a man standing at the tail end of an operation and making a selection of the same articles before they are piled. I think both operations mean selection from stock." (R. 282)

VI

CONCLUSION

The order of the Circuit Court of Appeals for the Second Circuit should be reversed and the order of the District Court for the Northern District of New York should be affirmed.

Respectfully submitted,

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October, 1942.

APPENDIX

[PUBLIC—No. 846—74TH CONGRESS]
[S. 3055]

AN ACT

To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all of the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the

Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the con-

tractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for other purposes", approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall this Act apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Approved, June 30, 1936.